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HAROLD B. WILLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR APPELLANT

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December 12, 1953

INDEX

Page

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

SPECIFICATION OF ERRORS 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

Introduction 10

I. This Court Should Decide Incidence of the Tax 11

II. Section 58-547 Imposes an Excise Tax 13

1. The Statute, Its Terms and Setting 13
   (a) The Present Scheme of Taxation 13
   (b) Legislative History 17

2. Administrative Interpretation of Gross Receipts Taxes in Virginia 26

3. Prior Decisions of This Court and of Other Courts Construing Gross Receipts Taxes 28

4. The License Tax Imposed by § 58-547 Is Designed to Measure the Extent of the Privilege Exercised by Express Companies in the Conduct of Their Business, and Is Not a Tax Upon the Going Concern Value of Property So Employed 30

CONCLUSION 35

APPENDIX 39

TABLE OF AUTHORITIES

Page

American Barge Line Co. v. Koontz, 68 S. E. (2d) 56 (W. Va. 1951) 29

Baltimore & Ohio R. Co. v. Koontz, 77 Va. 698 (1883) 21

Commonwealth v. Baltimore Steam Packet Co., 193 Va. 55, 68 S. E. 2d 137 (1951) appeal den'd 343 U. S. 923 ..... 15, 27

Freeman v. Hewitt, 329 U. S. 249 (1946) 35

Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217 (1908) 11

Lawrence v. State Tax Commissioner, 286 U. S. 276 (1932) 12

Maine v. Grand Trunk Railway Co., 142 U. S. 217 (1891) 24

McLeod v. Dilworth Co., 322 U. S. 327 (1944) 12

Meyer v. Wells, Fargo & Co., 223 U. S. 298 (1912) 29

New Jersey Bell Telephone Co. v. New Jersey, 280 U. S. 338 (1930) 28

Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602 (1951) 5, 8, 10

Storaasli v. Minnesota, 283 U. S. 57 (1931) 12

U. S. Glue Co. v. Oak Creek, 247 U. S. 321 (1918) 31

Virginia Electric & Power Co. v. Commonwealth, 174 Va. 316, 6 S. E. 2d 680 (1940) 24

Wisconsin v. J. C. Penney Co., 311 U. S. 435 (1940) 12

Wagner v. City of Covington, 251 U. S. 95 (1919) 11

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Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is reported at 194 Va. 757 and 75 S. E. 2d 61. The opinion of the State Corporation Commission of Virginia has not yet been officially reported. For text of opinion see R. 22.[1]

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered March 9, 1953 (R. 56). The petition

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[1] Reference to the pages of the printed transcript of record are made herein as follows: (R. .....). *Italics are supplied unless otherwise indicated.*

for appeal invoking the jurisdiction of this Court under Section 1257(2) of Title 28 of the United States Code[2] was filed May 21, 1953 (R. 58) and was allowed May 28, 1953 (R. 62). This Court noted probable jurisdiction on October 12, 1953 (R. 64).

This case meets the requirements of Section 1257(2) of Title 28 of the United States Code since the validity of Section 58-547 of the Code of Virginia, 1950,[3] which imposes on every express company a license tax for the privilege of doing business in Virginia, is drawn in question on the ground of its repugnancy to the Constitution of the United States when applied to an express company doing solely an interstate business in the state, and the final judgment rendered by the Supreme Court of Appeals of Virginia with respect thereto is in favor of its validity (R. 48).

QUESTIONS PRESENTED

The federal question presented to the State Corporation Commission and the Supreme Court of Appeals of Virginia and on this appeal is:

> Whether Section 58-547, which imposes, *"for the privilege of doing business in this State,* in addition to the annual registration fee and the property tax as herein provided, * * * *an annual license tax"* measured by a percentage of the gross receipts from operations of such companies within Virginia, is valid under the Commerce Clause of the United States Constitution when applied to an express company *doing solely an interstate business in Virginia.*

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[2] 62 Stat. 929; 28 U. S. C. 1257(2).

[3] Acts of General Assembly of Virginia (herein cited Acts), 1948, Chap. 466, § 219(d), page 924. See Appendix, page 39 of this brief for full text of Article 4, Chapter 12, Title 58 containing § 58-547.

STATEMENT OF THE CASE

Appellant, a Delaware corporation, operates interstate between all the forty-eight states of the United States and the District of Columbia and operates intrastate within all of the states *except Virginia.* The business of Appellant in Virginia has been confined solely to interstate business since the State Corporation Commission denied it authority to do an intrastate business by order dated April 8, 1929, in Case No. 3900, reported at page 252 of the annual report of the Commission for 1929. This decision was sustained by the Supreme Court of Appeals of Virginia, 153 Va. 498, 150 S. E. 419 (1929), and by this Court, 282 U. S. 440 (1931).[3a] Following that decision, Appellant organized in Virginia a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, for the *sole purpose* of conducting an express transportation business *in intrastate commerce* in that state.

Since its organization, the Virginia Company has done exclusively an intrastate business in Virginia and has reported to the State of Virginia, has been assessed with and has paid annually all taxes on property owned by it and money used and employed by it as well as the license tax imposed under § 58-547, *for the privilege of doing an intrastate express business in Virginia,* based on its total gross receipts each year (R. 15, 45).

Since the organization of its Virginia subsidiary, Appellant has made the requisite reports to the State of Virginia, has been assessed with and has paid annually all taxes on property and money used by it in Virginia all of which was

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[3a] This action resulted from the inhibition of § 163 of the Constitution of Virginia forbidding foreign corporations to exercise any of the powers or functions of a public service corporation in the state.

used by it exclusively in *interstate* commerce[4] and, under protest, it has likewise made the requisite report, has been assessed with and has paid annually the license tax imposed under § 58-547 *for the privilege of doing an interstate business in Virginia* (R. 44). Although this license tax ostensibly has been assessed pursuant to § 58-547 or its antecedent sections of the Virginia Code which requires an apportionment of its total gross receipts, it has in fact been assessed pursuant to informal understandings resulting from discussions with representatives of the State Corporation Commission.

The methods and formulae employed from time to time to determine the gross receipts of Appellant subject to assessment in Virginia and the amount of license tax annually to be imposed thereon have not been uniform and admittedly have not met the requirements of § 58-547 (R. 14). Prior to 1942 the gross receipts of Appellant taxable in Virginia were determined by applying to the mileage of lines operated in the state an arbitrary or fixed amount per mile, which was varied from year to year (R. 14). In 1942 an understanding, which did not purport to meet the requirements of the antecedent of § 58-547 but was a substitute therefor, was reached between the State Corporation Commission's staff and the then General Counsel of Appellant which has since served as a basis for the assessment of this license tax (R. 14, 46).

The various assessments annually made against Appellant since 1942 pursuant to this understanding have been accepted by the company and the tax paid thereon pursuant thereto under the following form of protest:

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[4] The Virginia Commission found and the parties have stipulated that Appellant has done no intrastate business in Virginia (R. 20).

"This company does an interstate business through, into, and out of Virginia but it has no way of ascertaining how much of the receipts on that business is earned in Virginia.

"The business passing through, into or out of this state is interstate business and is not subject to taxation by the state. It is understood that this report is intended to be used as the basis for levying a tax under Section 58-547 of the Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $..... reported as 'All receipts earned in Virginia on business passing through, into or out of this state' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestant cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax if applied to the interstate receipts of protestant, would violate the commerce clause of the Constitution of the United States, and therefore, is beyond the legal authority of the State of Virginia to levy." (R. 19)

Despite these annual protests, no refunds were sought by Appellant until the decision of this Court in the case of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), holding invalid the Connecticut tax imposed upon the franchise of a foreign trucking corporation *for the privilege of doing business within* the State when (1) the business consisted solely of *interstate* commerce, and (2) the tax was computed at a nondiscriminatory rate on *that part of the corporation's net income* which was *reasonably attributable to its business* activities within the State. Following

the decision in the *Spector* case, Appellant, by formal petitions filed with the Virginia State Corporation Commission, sought refunds for the taxes paid pursuant to § 58-547 for the years 1950 and 1951 in the amount of $70,665.68, and $66,454.71, respectively (R. 2, 6).

These petitions for refund raised the single question of the repugnancy of § 58-547 to the Commerce Clause of the Constitution of the United States by alleging that the license tax imposed by § 58-547 was "unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your petitioner to do an interstate business in this State, and constitutes a direct burden upon such commerce and a tax upon your Petitioner for the privilege of engaging therein, in contravention of the provision of Article I, Section 8, Paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States."[5]

The Commission heard the petitions together and dismissed the 1950 petition on a jurisdictional point not pertinent to this appeal. With respect to the 1951 petition, it held that § 58-547 was a *property tax* on the intangible elements of value generated by the employment in business of the physical properties of express companies in the State and not a *license or excise* tax and was, therefore, not violative of the commerce clause of the Constitution of the United States when applied to Appellant, although engaged solely in interstate commerce in Virginia (R. 21, 31).

The decisions of the Commission on both petitions were appealed to the Supreme Court of Appeals of Virginia on a consolidated record. The issue of the validity of the tax as applied to Appellant was raised on the appeal in the assignment of errors and statement of questions involved set forth

[5] Paragraph 6 of 1950 petition (R. 5) and paragraph 7 of 1951 petition (R. 9).

in Appellant's opening brief as required by the rules of the Virginia Court (R. 47).

The Virginia Court held that § 58-547 as applied to Appellant was not repugnant to the Commerce Clause of the Federal Constitution since it was not a tax on the *privilege* of conducting an express business in Virginia as specifically provided in the statute, but was a "property tax" levied on the element of value of Appellant's physical properties created by their employment in business in interstate commerce in Virginia (R. 51). The court's decision was applicable to the petitions for refund for both 1950 and 1951, rendering unnecessary a decision on the jurisdictional question upon which the Commission based its adverse decision on the petition for the 1950 refund.

Appellant is appealing from the decision of the Virginia Court on the constitutional question stated above.

SPECIFICATION OF ERRORS

The following assigned errors of the Supreme Court of Appeals of Virginia are urged on this appeal:

(1) The error of affirming the final orders of the State Corporation Commission of Virginia of June 16, 1952, denying Appellant's petitions for refund and thereby sustaining the validity of Section 58-547 of the Code of Virginia, 1950, in so far as it purports to authorize the assessment of a tax upon the gross receipts of Appellant derived solely from interstate commerce; and

(2) The error of failing to hold that Section 58-547 of the Code of Virginia, 1950, is a privilege or excise tax which, in so far as it purports to authorize the assessment of the tax therein provided against Appellant, contravenes the Commerce Clause of the Constitution of the United States.

SUMMARY OF ARGUMENT

This Court is not bound by the label placed upon a state statute by a state court if the tax affects commerce among the states so directly as to amount to a regulation thereof and it may and should decide for itself the character of the tax and whether, as applied, it affects the constitutional rights of the taxpayer in question.

The scheme of taxation of express companies by the Commonwealth of Virginia includes, in addition to an annual registration fee, (1) a tax on their real estate and tangible personal properties payable to the localities, (2) a tax on their intangible personal property including money in the state payable to the state and (3) "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, * * * *an annual license tax*" based upon the gross receipts of the companies actually earned in Virginia or properly apportioned thereto. This gross receipts tax is in name, terms, nature and effect an excise or privilege tax on the conduct of an express business in, through or into or out of Virginia and, as applied to Appellant, engaged solely and exclusively in an interstate express business through, into and out of Virginia, is in clear violation of the Commerce Clause of the Constitution of the United States as construed and applied in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951).

The action of the Corporation Commission and the Virginia Supreme Court of Appeals in holding the gross receipts tax on express companies, for the privilege of conducting an express business in Virginia, a "property tax" and stating the incidence of the tax to be the element of property value of express companies produced by the employment of their physical properties in business in this State is:

(a) inconsistent with the clear language of the statute as employed by the Virginia General Assembly;

(b) contrary to the intention of the General Assembly as evidenced by the entire scheme and legislative history of taxing express companies in Virginia;

(c) inconsistent with the manner in which this and similar gross receipts taxes has been construed by the taxing officials of Virginia for many years;

(d) at variance with decisions of this and other courts construing similar statutes;

(e) contrary to the inherent nature and effect of a gross receipts tax which does not measure and is not directly related to *values* produced by the operation of a business (net profits) but is a tax on the privilege of conducting the business whether operated at a loss and therefore producing no *values* or whether operated at a profit and thereby producing *values;* and

(f) an unreasonable and unjustifiable attempt to distinguish, where in fact no difference exists, between a tax levied in terms on the privilege of doing business and a tax levied on the going concern or franchise value produced solely by the employment of already taxed physical properties in such business, which value would not exist in the absence of the exercise of the privilege.

ARGUMENT

Introduction

Since there is no dispute that Appellant has done exclusively an interstate transportation business in Virginia, the controlling issue in this case is a determination of the operating incidence of the tax imposed by Section 58-547, which provides as follows:

> "§ 58-547. Annual license tax. — Every such company, *for the privilege of doing business in this State,* in addition to the annual registration fee and the property tax as herein provided, *shall pay an annual license tax* as follows:
>
> "The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State."

If Section 58-547 levies a tax on the privilege of doing an express business in Virginia then the decision in *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602 (1951), is controlling and the tax as applied to Appellant, engaged solely in interstate transportation in Virginia, violates the Commerce Clause as a direct burden on interstate commerce. In the *Spector* case it is stated that:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state." (p. 609)

The purpose of this brief is (a) to point out that this Court should decide for itself the incidence of the tax and (b) to establish that that incidence is *the privilege of doing an express business* in Virginia and not such property value as may be produced solely by the exercise of that privilege.

I.

This Court Should Decide the Incidence of the Tax

Appellant respectfully submits that the Virginia gross receipts tax on express companies bears upon commerce among the states so directly as to amount to a regulation thereof in a relatively immediate way. This is the type of statute the construction of which this Court has consistently reserved unto itself.

In *Galveston H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217 (1908), Mr. Justice Holmes in stating that a tax could not be saved by name or form, added:

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, *can take away our duty to consider its nature and effect.*" (p. 227)

In *Wagner* v. *City of Covington,* 251 U. S. 95 (1919), a license ordinance was held valid as applicable to peddlers

despite prior decisions of the state court that the type of activity in question did not constitute peddling. The Court stated that:

> "The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution: neither can it render unconstitutional a tax that in its actual effect violates no constitutional provision by inaccurately defining it." (p. 102)

In *Storaasli* v. *Minnesota*, 283 U. S. 57 (1931), on appeal from the Supreme Court of Minnesota, a motor vehicle registration tax claimed to be a property tax, held by the state court to be, "both a property tax and a privilege tax", was held to be a privilege tax. This Court stated that it:

> *"decides for itself the character of the tax, and whether as applied to the appellant it affects his constitutional rights."* (p. 62)

In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), on certiorari to the Supreme Court of Wisconsin, it is stated:

> *"But the descriptive pigeon-hole into which a state court puts a tax is of no moment in considering the constitutional significance of the exaction."* (p. 443)

See also *Lawrence* v. *State Tax Commissioner*, 286 U. S. 276 (1932); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944).

It is therefore respectfully submitted that this Honorable Court is not bound by the decision of the Virginia court in defining the incidence of the tax under review and should determine for itself its nature and effect and whether it con-

stitutes a burden on interstate commerce when applied to Appellant.

II.

Section 58-547 Imposes an Excise Tax

1.

The Statute, its Terms and Setting

In reaching its conclusion that this is a property tax the Virginia Court has ignored the plain language of the statute as well as the legislative intent revealed in the long history of express company taxation in this State.

(a)

THE PRESENT SCHEME OF TAXATION

An analysis of Section 58-547 in the light of pertinent constitutional provisions and the other statutory provisions for the taxation of express companies as set forth in Article 4, Chapter 12, Title 58 of the Code of Virginia, 1950[6] establishes conclusively that the tax imposed by that section is an *excise* or *privilege* tax and not a *property* tax.

Section 168 of the Virginia Constitution provides for the taxation of all *property* except that specifically exempted. Section 171 of this Constitution segregates all such taxable property according to its characteristic as tangible or intangible property and provides for the taxation of all taxable tangible property (except rolling stock of public service corporations) only by the localities and of all taxable intangible property only by the state.

These provisions are the constitutional authority for the first section of Article 4 (Section 58-546, captioned, "Taxes

[6] See Appendix page 39 of this brief for full text of Article 4.

on *property* of express companies.") which provides that every express company shall "pay to the State and to the several counties, cities and towns of the State wherein they may have taxable properties located, the taxes levied on such *property* as follows:". The statute then lists the rates of the taxes payable to the *State* on "intangible personal property" and "money" and, following the mandate of the Constitution, provides for *local* levies on "real estate and tangible personal property" of express companies. Thus in the first section of Article 4 the General Assembly has provided a comprehensive plan for the taxation of all types of *property* which express companies normally employ in the operation of their business — money, intangible personal property, tangible personal property, and real estate.

Section 170 of the Constitution authorizes the General Assembly to levy income taxes and "a license tax upon any business which can not be reached by the ad valorem system." In what was clearly an exercise of this authority the General Assembly enacted the second section of Article 4 (Section 58-547, captioned, "Annual *license* tax."), the opening provision of which is as follows:

> "Every such company, *for the privilege of doing business in this State*, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual *license* tax as follows:"

Then follows the rate of tax and a formula for apportioning gross receipts when interstate business is involved. It is significant that the tax imposed by this second section of the Article is *in addition* to "the property tax" imposed by the first section, which specifically includes the state tax on "intangible personal property."

The remaining provisions of the Article are largely ad-

ministrative in nature and, with one exception, are not pertinent here. The eighth section (§ 58-553, captioned "No other taxes on express companies.") provides that "the amount of taxes and licenses imposed by this article and authorized to be imposed *shall be in lieu of all other taxes and licenses,* State, county and municipal, upon all the *property, franchises* and *privileges* of such companies", except motor vehicle licenses and fuel taxes.

The scheme and language of these constitutional and statutory provisions clearly reveals the intended distinction between (1) *ad valorem* property taxes and (2) a license tax, or tax on business measured by gross receipts. *All property,* whether tangible or intangible, is required to be taxed according to value by either the state or the localities depending upon whether this property is classified as tangible or intangible. *That* increase in the value of property, regardless of its classification, attributable to its effective use in business, that is, its "going concern value", which can not be reached by this *ad valorem* system, may be subjected to a license tax by the state.

The simplicity of this scheme contrasts sharply with the misconceived theory by which the Court of Appeals sought to justify its characerization of the *license* tax imposed by § 58-547 as a *property* tax. That misconception appears in *Commonwealth* v. *Baltimore Steam Packet Co.,* 193 Va. 55, 68 S. E. 2d 137 (1951), appeal den'd 343 U. S. 923 (1952), involving a substantially identical scheme for taxing steamship companies, which the Virginia Court considered as controlling in this case. There the Court correctly observed:

> "Title 58 of the Code, Taxation, provides in chapter 12 thereof, sections 58-503 through 58-685, a system of taxation of public service corporations, including railway and canal companies, express companies,

> steamship companies, and others. The general pattern of the system is that these companies pay to the locality taxes on real estate and tangible personal property; to the State taxes on intangible personal property and money, and in addition a tax, called a franchise tax in some cases and a license tax in others, measured by gross receipts. Provision is made for apportionment in the case of interstate transportation when necessary. The value of all property for taxation, tangible and intangible, is fixed by the State Corporation Commission." (p. 68)

but erroneously concluded:

> "It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their *dual* values, the dead value, or 'the bare bones', to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. . . . In its derivation and substance it is a tax *on an element of value of the physical properties* not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause." (p. 70)

Section 171 of the Virginia Constitution does not segregate the dead elements of physical property for local taxation and its live elements for taxation by the state. There is no justification in either the Constitution or statutes for a distinction, insofar as property taxes are concerned, between so-called "live" and "dead" property values. The constitutional and statutory distinction is between tangible and intangible property and either of these may have both living and dead values according to the manner and efficiency in which they are used. The confusion of the Court in the

Baltimore Steam Packet Co. case was due to this unjustified and improper identification of "dead" values with tangible property and "live" values with intangible property as those terms are used in the statutory scheme described above.

This view clearly does violence to the legislative intent evidenced by the scheme for taxing steamship companies which was under consideration in that case and which is practically identical to the scheme for taxing express companies. The legislative intent clearly revealed in the scheme for taxing express companies should not be frustrated in this case by the same misconception under which the Virginia Court labored in the *Baltimore Steam Packet Co.* case.

(b)

LEGISLATIVE HISTORY

A review of the legislative history of the taxation of express companies confirms this conclusion. The first special tax on express companies imposed in Virginia was in 1856, in the form of a "license" tax measured by total receipts from express company operations in this State.[7] The language of this first gross receipts tax statute throws little light upon the nature of the tax except to characterize it as a *license* tax, but in 1860 when the tax was reimposed the legislature used language which is significant.[8] There, in a separate chapter entitled, "An ACT making regulations concerning licenses," the legislature provided:

> "39. *On every license* to a person or company carrying on an express business for compensation [there shall be a tax of] fifty dollars; and in addition thereto, every such company shall make a return to the auditor

[7] Acts, 1855-56, Chap. 9, p. 15.
[8] Acts, 1859-60, Chap. 2, p. 38.

> of public accounts . . . of the total receipts of such company on account of its operations within the state of Virginia . . . [and] shall pay on the total receipts so reported, a tax of one-half of one per centum. . . . *Such license shall give privilege throughout the State.*"

Thus, almost from its inception this tax has been the price paid by express companies *for the privilege of doing an express business in Virginia.* Express companies continued to be taxed on the basis of their gross receipts at increased rates until 1870 when, in January of that year, Virginia's Post-Civil War Constitution[9] was approved by Congress. By that Constitution Virginia embraced with vigor the principle of *ad valorem* property taxation which had never been supported in the *ante bellum* days. In addition to the direct tax on *property* according to *value*, Article *X* of that Constitution authorized the General Assembly to levy an income tax and a *license* tax upon all businesses "which cannot be reached by the *ad valorem* system.[10]

The first General Assembly to function under this new Constitution promptly imposed a *state ad valorem* tax on all the real and personal property of express companies. In addition, this legislature rejected, temporarily, the gross receipts tax and imposed, in addition to the property tax, a 5% tax on the net income of all express companies earned on business done in this State.[11] This net income tax on express companies was abandoned in 1872 when gross receipts were again adopted as the measure (at the rate of 2%) of the tax on express companies in addition to the *ad valorem* property tax.[12]

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[9] Constitution of Virginia, 1869.

[10] Idem, Article *X*, § 4.

[11] Acts, 1869-70, Chap. 226, p. 354, 356.

[12] Acts, 1871-72, Chap. 385, p. 474.

These early acts under the new Constitution omitted the descriptive word "license" but in 1882 the general revenue act, after imposing the *ad valorem* property tax, clearly described the character of the additional special tax on express companies when it provided:

> "No express . . . company, shall transact such [express] business without a license authorized by law. . . . *The specific license tax* on any express . . . company . . . shall be one-half of one per centum on the gross earnings of such company."[13]

In 1884, the net income of express companies earned or apportioned to this State was again made the basis for the special tax in addition to the *ad valorem* tax on all the real and personal property of these companies.[14] Again the descriptive term "license" was omitted. But in 1890 express companies were made the subject of a specific *license* tax, based on neither gross nor net receipts but on *the mileage operated* by each company in Virginia.[15] Express companies operating in excess of 1000 miles paid a flat "license tax" ("in addition to the property tax") of $500.00; those with less mileage, $300.00. Although there was nothing distinctive about the language of the act imposing this tax it is noteworthy that this statute was entitled a *"License* on offices of express companies". Clearly, there is nothing to indicate that this was intended to be a *property* tax or anything except what it was expressly said to be: *a tax on the privilege of operating an express business in Virginia.*

This license tax was next placed on a more graduated scale[16] and in 1908 replaced by a flat $3.00 per operating

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[13] Acts, 1881-82, Chap. 119, p. 508.

[14] Acts, 1883-84, Chap. 450, p. 572.

[15] Acts, 1889-90, Chap. 244, p. 211.

[16] Acts, 1899-1900, Chap. 499, p. 534 (ranging from $250.00 to $2,750.00 according to operating miles).

mile *license* tax.[17] The language of the 1908 Act is significant. Chapter 165 amended and re-enacted Sections 29 and 30 (dealing with the assessment and taxation of express company property) so as to provide in pertinent part as follows:

> "§ 29. Each express company doing business in this State . . . shall report annually . . . to the State corporation commission, *all* of its real and personal property of every description in this State belonging to it. . . .
>
> * * *
>
> "The State corporation commission shall assess upon said *property* the taxes imposed thereon by law and upon said companies the *license* tax imposed by law."
>
> "§ 30. On the real and personal property of every express company doing business in this State, . . . there shall be a tax of twenty cents for each one hundred dollars of the assessed value of the real estate and tangible personal property, and a tax of twenty-five cents on every one hundred dollars of the assessed value of the intangible property of every such company; . . ."

Chapter 179 amended and re-enacted § 31 (dealing with the license tax) to provide:

> "§ 31. Each and every express company doing business in this State *in addition to the property tax,* shall for the *privilege of doing business* between points within this State, pay a *license* tax as follows, to-wit:
>
> "Each and every express company operating a mileage in this State shall pay a *license* tax of (3) three dollars for every mile so operated in this State, and no express company *which shall have paid the privilege tax hereby imposed,* shall be required to pay an additional

[17] Acts, 1908, Chap. 165, p. 240, Chap. 179, p. 257.

tax to the State *except the property* tax hereinbefore referred to and its annual registration fee."

Certainly this express company license tax could not be more clearly distinguished from the tax on all of the property of these companies. Thereafter the taxation of express companies remained unchanged (except that the rate was increased),[18] until 1915, when gross receipts was again adopted as the basis for *measuring* the *license* tax on express companies.[19] This "license tax" of 1.25% of all gross receipts earned in or allocated to Virginia "for the privilege of doing business in this State", was, as theretofore, "in addition to the annual registration fee and the property tax herein provided".

Also, in 1915, the General Assembly undertook for the first time *to segregate the subjects of state and local taxation.* Until that time the localities had generally been free to tax property, including that of public utilities, according to their revenue needs.[20] The difficulties and inequalities which arose when both state and local authorities sought to tax the rolling stock of railroads ultimately led to tax segregation. As first enacted,[21] the segregation law provided that all real and tangible personal property (except the rolling stock of steam railways) and merchant's capital should be reserved only for *local* taxation (except that real property would temporarily remain subject to limited State taxation), while such rolling stock and all taxable intangible personal property should be reserved for taxation only by the *State.* Thereafter express companies paid, in

[18] Acts, 1910, Chap. 111, p. 164 (to $6.00 *per mile*).

[19] Acts, Extra Session 1915, Chap. 141, p. 204.

[20] Acts, 1879-80, Chap. 106, p. 82; see *Baltimore & Ohio R. Co.* v. *Koontz,* 77 Va. 698 (1883).

[21] Acts, Extra Session, 1915, Chap. 85, p. 119.

addition to the license tax, the state tax on intangible personal property and the local taxes on their real and tangible personal property, as assessed by the State Corporation Commission. This system has remained the same since 1915 except for changes in tax rates, exemption of municipal bonds from taxation as intangible personalty and the completion of the State's system of segregation of property for tax purposes in 1926 by the elimination of *all* state taxes on real property.[22]

This review of Virginia taxes on express companies discloses (1) that with few exceptions the tax under consideration has always been *described* as a *license* tax, (2) that most such statutes have made payment of the tax a condition precedent to the right to engage in that business or have characterized the tax as one on "the privilege of doing business in this state", (3) that this special tax has, since 1870, always been "in addition to" the *ad valorem* property tax on all real and personal property of express companies, and (4) has always been measured by either gross receipts, net income or operating mileage.

The decision appealed from disregards the legislative intent evidenced by this consistent scheme of taxation and erroneously holds that (despite the clear distinction between *property* and *license* taxes evidently in the minds of the legislators and the unequivocal description of the intended incidence of the tax as "the privilege of doing business in this State") what was really sought to be taxed was some "element of value of the physical properties" of these express companies.

The history of the special tax on *railroads* also reveals the nature of the tax on *express* companies. Both industries were first specially taxed in the same year and by the same

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[22] Acts, 1926, Chap. 576, p. 955. This is now Code of Virginia, 1950, §§ 58-9, 58-10, and was made permanent by the amendment of Section 171 of the Constitution, ratified June 19, 1928.

Act,[23] the railway tax first being measured *by passenger miles*. A gross receipts tax was soon imposed on railroad companies[24] which were thereafter taxed on that basis until 1870. In that year railways, like express companies, were subjected to *ad valorem* property taxes and a net income tax.[25] Railroads were taxed in this manner, but at increased rates until 1902 when Virginia's present Constitution became effective. The provisions of this new Constitution concerning railroad taxation have the detail of a code and, together with the report of the debates of the Constitutional Convention, reflect the concern of the delegates for the taxation of this kind of transportation company.

Section 176 of the Constitution provides for the assessment of all *railroad* property (except its franchise and nontaxable stock) by the State Corporation Commission, and its taxation by the State and localities at uniform rates. As originally adopted this section prohibited a tax on the net income of railroads but this provision was deleted by the amendment ratified June 19, 1928.

Section 177 of the Constitution authorizes the levying against each railroad corporation of an annual franchise tax of a percentage of gross transportation receipts to be fixed by the General Assembly "for the privilege of exercising its franchises in this State". The term "gross transportation receipts" is defined by Section 178 to permit apportionment in the case of interstate lines. Section 179 describes the annual reports required to be made to the Commission.

These constitutional provisions were promptly put into effect by the General Assembly which adopted a new gen-

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[23] Acts, 1855-56, Chap. 9, p. 15.
[24] Acts, 1859-60, Chap. 1, p. 21.
[25] Acts, 1869-70, Chap. 226, p. 355.

eral revenue law imposing on railroad companies the *ad valorem* property taxes and the new *franchise* tax measured by gross receipts.[26] This law is the same today except as changed by tax rate increases and segregation.

It is immediately apparent that railroad and express companies have run parallel if not identical tax courses. The railway tax has never been classified as a "license" tax (nor the express company tax as a "franchise" tax). Indeed, this special tax on railroads had no name at all until denominated a *franchise* tax in the 1902 Constitution. It has never been held that the franchise tax on railroad corporations was a property tax or any other kind of tax except what it is described in the Constitution to be: a tax "for the privilege of exercising its franchises in this State."[27] Moreover, there is strong reason to believe the draftsmen of this section of the Constitution *specifically intended to impose an excise tax.*

The report of the debates[28] reveal that in response to a question regarding Section 177, the spokesman for the committee which drafted the provision indicated that it was copied from the Maine statute in the light of the construction placed upon that statute *by this Court* in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217 (1891), that it imposed an *excise* tax. Also, in at least one case the Virginia Court has held that the railway gross receipts tax is a *franchise* tax as distinguished from a tax on the property used to produce those gross receipts. In *Virginia Electric & Power Co.* v.

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[26] Acts, Extra Session 1902-3-4, Chap. 148, p. 155. Actually, in its haste, the General Assembly anticipated the ratification of the new constitution and by an Act approved in April, 1902, but to become effective on January 1, 1903, adopted the provisions concerning railroad taxation. Acts, 1901-02, Chap. 677.

[27] Constitution of Virginia, 1902, § 177.

[28] *Debates of the Constitutional Convention of Virginia*, 1901-2, II, p. 2671.

Commonwealth, 174 Va. 316, 6 S. E. 2d 680 (1940), the Court, in sustaining the application of this tax to the gross receipts of a street railway, earned in part by the use of buses, said:

> "So long as its present charter powers are unchanged it is an electric railway corporation with power to operate street cars and buses in the four cities of Richmond, Petersburg, Norfolk and Portsmouth, *and it is this power or right or franchise* upon which the State levies a tax, to be measured by the prescribed percentage of its gross transportation receipts derived from its entire transportation system." (p. 328)
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> * * *
>
> ". . . the tax of which the appellant corporation complains is a *franchise* tax upon its *powers* as an electric railway corporation." (p. 329)

Upon these considerations it is clear that the railway *franchise* tax is not a *property* tax but an *excise* paid for the privilege of operating between points in this State and measured by the most commonly accepted indicator of the extent of that privilege: gross transportation receipts. The express company license tax is so nearly identical historically and in terms that the same is necessarily true of it. Indeed, the long use of operating mileage as a basis for measuring the express company tax suggests, even more than in the case of railways, an excise or privilege tax, for operating mileage gauges more accurately than gross receipts *the extent or scope of the privilege covered by the license.*

The decision of the Commission in the present case, affirmed by the Virginia Court, clearly and erroneously disregards the plain language and obvious meaning of § 58-547 as well as its antecedent and companion statutes, ignores the

long and generally consistent method of express company taxation in Virginia and departs without justifiable reason from the holding which clearly characterizes the practically identical railway tax as a *franchise* or *privilege* tax.

2.

Administrative Interpretation of Gross Receipts Taxes in Virginia

The State Corporation Commission of Virginia recognized for many years that license taxes on certain transportation companies were not levied on their *properties* within the State and, when sought to be applied to their gross receipts from interstate operations, were a direct burden on interstate commerce. This is indicated by the Commission's consistent practice of avoiding the imposition of these taxes on receipts from business passing through, into or out of the State strictly in accordance with the statutory formulae.

In the case of the license tax on express companies the Commission first employed, in lieu of the full gross receipts statutory formula, an arbitrary fixed amount per mile operated in the State to determine the tax. After 1942, the Commission used the arbitrary formula described in Exhibit 8 (R. 46). This attitude of the Commission indicated an administrative purpose to avoid the heavy burden on interstate commerce which the gross receipts tax would have imposed if applied strictly in accordance with the terms of the statute. Needless to say, the Commission's concern with the burden of this tax on interstate express companies was because it then considered the tax to be a privilege tax, for it would have had no occasion for such concern had it considered the tax to be a property tax.

In the case of the similar tax on steamships and other

water carriers[29] the Commission had not since 1915, when that statute was enacted, taxed water carriers on receipts from interstate business until 1950, when it reversed its administrative interpretation of 35 years standing and assessed a gross receipts tax on *all* receipts of water carriers in Virginia on the *new* theory that the tax was a *property* tax and not a *privilege* tax. In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137 (1951), which upheld this *new* judicial interpretation, the reason for the Commission's earlier administrative interpretation is explained:

> "The majority of the Commission *felt bound by the fact that not since 1915*, when the present section 58-575 was enacted as section 31 of Chapter 141, pp. 197, 206, Acts, 1915, *has the Commission taxed water carriers on receipts from business 'passing through, into or out of this State'*. This has been because in 1915 the Attorney General's office advised the Commission that that feature of the statute was unconstitutional." (p. 70)

The *Baltimore Steam Packet Company* case was decided December 3, 1951. The General Assembly of Virginia met in January, 1952, and immediately confirmed the prior administrative interpretation of § 58-575 by amending it to provide that such taxes should be measured *only* by their gross receipts derived from *intrastate* commerce.[30] There is nothing whatever in this enactment indicating a legislative purpose to impose a *property* tax determined by a certain percentage of the gross receipts of such companies. On the contrary, the legislature again re-enacted the tax as "an annual State license tax" upon such companies and de-

[29] Section 58-575 of the Code of Virginia 1950.

[30] Acts, 1952, Chap. 486, page 779.

clared it to be "*in addition* to the annual registration fee and *property* tax" imposed upon such companies by the preceding sections.[31] This action of the legislature alone justifies restoring to the gross receipts taxes imposed upon transportation companies the meaning traditionally accorded the language of §§ 58-575 and 58-547.

Appellant respectfully submits, therefore, that the action of the General Assembly in amending § 58-575 immediately after the decision by the Virginia Court in the *Baltimore Steam Packet Company* case definitely establishes the legislative intent to impose a *privilege* rather than a *property* tax. If there was any intention on the part of the General Assembly that this tax should be a *property* tax, there could have been no basis for distinguishing between property derived from intrastate commerce and that produced by interstate commerce.

3.

Prior Decisions of This Court and of State Courts Construing Gross Receipts Taxes

There are numerous cases in which gross receipts and similar taxes on express companies and other public service companies have been held to be *privilege* taxes rather than *property* taxes.

In *New Jersey Bell Telephone Co.* v. *New Jersey*, 280 U. S. 338 (1930), a telephone company, part of the business of which was in interstate and foreign commerce, was taxed *ad valorem* on its real and personal property and was subjected to a franchise tax of 5% of the gross receipts apportioned to New Jersey. The statute called the tax a *franchise*

[31] § 58-570 to § 58-574 of Article 7, Chapter 12, Title 58 of the Code of Virginia, 1950, as amended.

or privilege tax and the state sought to support it as a tax on *property* represented by the *value* of the company's franchise. This Court, reversing the New Jersey Court, held that it was not a property tax:

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void. Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 345. Galveston, H. & S. A. R. Co. v. Texas, supra, 227. Meyer v. Wells, Fargo & Co., 223 U. S. 298. U. S. Express Co. v. Minnesota, 223 U. S. 335. Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 295, 297. Cudahy Packing Co. v. Minnesota, 246 U. S. 450. U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 329. Pullman Co. v. Richardson, supra." (p. 349)

In *Ohio Tax Cases*, 232 U. S. 576 (1914), the Court held that a tax on gross intrastate earnings of railway companies, in addition to the taxes on their property, was a *privilege* or *occupation* tax and not a *property* tax, and in *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298 (1912), a gross revenue tax on public service corporations, including express companies, was held not to be a tax upon the property of express companies.

Of especial significance is *American Barge Line Co.* v. *Koontz*, 68 S. E. 2d 56 (W. Va. 1951), in which the Supreme Court of that state held that an annual *privilege* tax based on *gross* income from the business of transporting passengers and freight by steamboat was clearly a *privilege* tax on interstate commerce in contravention of the Commerce Clause of the Federal Constitution. This case repre-

sents the reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at bar and so presents a conflict on a question arising under the Constitution of the United States, between the respective Supreme Courts of the two states which should be resolved by this Court so that uniformity of taxation among the states will be achieved.

Thus the authorities in which the question has been specifically presented fully support the position that the tax imposed by § 58-547 is a *privilege* tax and not a *property* tax.

4.

The License Tax Imposed by § 58-547 Is Designed to Measure the Extent of the Privilege Exercised by Express Companies in the Conduct of Their Business, and Is Not a Tax Upon the Going Concern Value of Property So Employed.

The tax imposed by § 58-547 is measured by the *gross* receipts of express companies derived from intrastate business done in Virginia and interstate business apportioned to Virginia and is therefore *levied in direct proportion to the extent that the privilege of carrying on an express business in Virginia is exercised and not necessarily to the value (net profits) produced by the exercise of that privilege.* The tax is on the privilege itself and nothing else, for it must be paid regardless of whether the operation of an express company produces *value* by operating at a profit, or produces no value by operating at a loss. If this were a tax on the *value* produced by the exercise of the privilege, as the Commission and the Virginia Court hold, it would have to be levied on the *net* profits and not on the *gross* receipts. Earnings after expenses and other charges, and not gross receipts, *measure*

the value of property produced from the exercise of the privilege.

This Court in *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321 (1918), discussed this significant difference as follows:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (pp. 328-329)

The basic error of the Virginia Court lay in its failure to recognize this fundamental distinction, or its refusal to do so, in order to *classify* the tax as a *property* tax. Without that classification it is impossible to support the Commonwealth's right to levy the tax against Appellant, engaged solely in interstate transportation in the state. The Virginia Court disclosed its awareness of this situation in its earlier decision in *Commonwealth* v. *Baltimore Steam Packet Co., supra,* concerning a similar gross receipts tax on water carriers. There the taxpayer was admittedly engaged in both interstate and intrastate commerce in Virginia. After making specific reference to the similar tax on express companies, the Virginia Court refused to decide the case *solely* on the ground that the tax was levied for the privilege

of carrying on *intrastate* business (fairly computed by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate business) for which there was ample precedent,[32] but preferred to lay the ground work for sustaining the gross receipts tax against Appellant by assigning as an alternate ground for its decision that the tax was levied *on the augmentation in value of the physical assets* of the taxpayer in Virginia resulting from their use as *part of a going business* (R. 51).

The Virginia Court made it quite plain that the *property* which it conceived to be the *subject* of the gross receipts tax was the additional value of the physical properties *located in this state,* generated by their employment as part of a going business. In both *Baltimore Steam Packet Co.* and the present case, the Court described the property it considered to be taxed as follows:

> "In its derivation and substance it is a tax *on an element of value* of the physical properties not reached by the tax levied by the localities, but reserved to the state, and not otherwise taxed" (R. 50).

The Court in this case further described this property as follows:

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[32] In *Spector Motor Service* v. *O'Connor, supra,* the Court stated:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. *Interstate Pipe Line Co.* v. *Stone, supra: International Harvester Co.* v. *Evatt,* 329 U. S. 416; *Atlantic Lumber Co.* v. *Comm'r of Corporations and Taxation,* 298 U. S. 553." (p. 609)

> "The physical assets of a taxpayer are said to have a dual value when used in an established going concern; a dead value, or the value of the bare tangible properties themselves; and a live value or the intangible value which it created by the concerted utilization of the congeries of unrelated items." (R. 51)

Appellant freely admits that a going business, if operated at a profit or if there is a reasonable expectation of earning a profit on future operations, may have a going concern or what is sometimes called an "organization" value. The difficulty with the Virginia Court's theory is that the tax in question does not measure that value.

In 1951 the total assessed value of all of Appellant's real and tangible personal properties in Virginia was $129,279.00 and in 1950 it was $119,979.00 (Ex. 6, R. 44). In holding the gross receipts tax to be a *property* tax the Court and the Commission in effect makes the absurd determination that the "going concern value" properly to be attributed to *those physical properties* was $3,090,916.55 in 1951 and $3,286,775.70 in 1950 or in each year approximately 2390% of the value of such assets from which such increment is said to accrue. This in and of itself is so far from the realities of economic life as conclusively to demonstrate the error of the decision that this tax is a *property* tax.

The gross receipts earned by the business of Appellant in Virginia is a proper measure of the exercise of the *privilege* of doing the interstate Virginia business if that privilege were lawfully taxable in Virginia. It measures nothing else. It is a proper measure of what the General Assembly had in mind when it levied a license tax for *the privilege of doing business in Virginia*. But because of the action of the State itself in refusing to permit *Appellant* to carry on in Virginia any *intrastate* commerce,[33] that license tax is not

[33] See p. 3, *supra*.

valid as to Appellant because it is a tax on the privilege of engaging in interstate commerce. Substance can not be ignored and the tax given a new form merely to avoid this adverse economic consequence to the Commonwealth. Characterization of the tax as a *property* tax at such a late hour in the shadow of *Spector Motor Service, Inc., supra,* is an obvious resort to form since a *property* tax classification was necessary to support the right of the Commonwealth to levy the tax.

The tax cannot fairly and realistically be said to be a tax on *property,* tangible or intangible. It is completely unrealistic to say that in 1951 Appellant used in Virginia property of a *total* value of $3,220,195.55, composed (1) of a *physical* value of $129,279.00 and (2) a going concern value of $3,090,916.55, and in 1950 property of a total value of $3,406,754.70, composed (1) of a *physical* value of $119,979.70 and (2) a going concern value of $3,286,775.70, or in both years almost 24 times the value of the physical property alone,[34] and yet that is the practical consequence of the form to which the Virginia Court resorted to sustain the tax. Appellant had no such property, no one would have paid anything for any such assumed property values because the net income from the business has no relation to the assumed property value and it is not possible to earn a return on that assumed value.

Obviously, the General Assembly was not attempting to value property in adopting the gross receipts tax and the decision of the Court below cannot have the effect of creating such a property value.

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[34] Similar ratios have existed between the tangible value of Appellant's property in Virginia and its gross receipts allocated to Virginia in every year since 1931. (See Exhibit 6, R. 44).

CONCLUSION

The plain language of the statute, its legislative history, the long administrative interpretation applied to it and similar taxes by the taxing authorities of Virginia prior to 1948, the decisions of this Court and those of State Courts and the inherent nature of a gross receipts tax all point to the necessary conclusion that Section 58-547 imposes an *excise* or *privilege* tax and is not a *property* tax on the intangible increment of value of the physical properties of Appellant in Virginia produced by the use of those assets in a going business. *The tax measures the extent to which the privilege is exercised but is no indication of such property values as may be produced by the exercise of the privilege.*

In addition to the foregoing, it is submitted that there is no less burden on, or any less regulation of commerce, or in fact any substantial difference in a tax on property values produced *solely* by the exercise of the privilege of doing an interstate express business (which values could not and would not exist in the absence of the exercise of that privilege), and a tax on the exercise of the privilege itself. Appellant submits that if there is a distinction it is without substantial difference since in reality both are a direct tax on interstate commerce.

The Commonwealth of Virginia has many constitutional ways of raising revenue and it is not dependent on taxes derived from the conduct of interstate commerce. This Court has said in *Freeman* v. *Hewitt*, 329 U. S. 249 (1946):

> "To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function." (p. 253)

For the foregoing reasons, Appellant respectfully submits that the judgment appealed from should be reversed and the statute as construed by the Virginia Court and applied to Appellant declared unconstitutional.

Respectfully submitted,

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December 12, 1953

Article 4, Chapter 12, Title 58 of The Code of Virginia, 1950

§ 58-546. Taxes on property of express companies.—Each and every one of the express companies doing business in this State shall, on or before the first day of October of each and every year, pay to the State and to the several counties, cities and towns of the State wherein they have taxable properties located, the taxes levied on such property as follows:

(1) The State tax on the intangible personal property (other than shares of stock, and bonds issued by counties, cities and towns or other political subdivisions of this State) owned by every such company shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof;

(2) The State tax on the money of every such company shall be twenty cents on every one hundred dollars of the assessed value thereof;

(3) There shall be no local levies assessed on such intangible personal property or money;

(4) On the real estate and tangible personal property of every such company there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property located in such localities, the proceeds of which local levies shall be applied as is provided by law.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 923.)

§ 58-547. Annual license tax.—Every such company for

the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, §219; 1948, p. 924).

§58-548. Annual report.—Every company doing an express business in this State on any railroad, steamboat, vessel, bus, truck, aircraft of any kind or on any other kind of vehicle or instrumentality of transportation shall report annually on or before the first day of May to the Commission all of its real and personal property of every description in this State belonging to it as of the beginning of the first day of January preceding showing particularly in what city, town, county and school district the property is located and classifying the same under the following heads:

(1) All of its real and personal property of every descrip-

tion in this State showing the cost and market value of such property;

(2) The total number of miles operated within and without this State for the year ending December thirty-first next preceding;

(3) The gross receipts from operation entirely within this State and if operations are partly within and partly without this State the entire gross receipts from operation for the year ending December thirty-first next preceding;

(4) Any and all other information, in such manner and in such detail as the Commission shall require. (1928, p. 148; 1942, p. 408; Tax Code, §218.)

§58-549. Assessment of value of property.—The Commission shall, after thirty days' notice previously given by it to the president or other proper officer, assess the value of the property of each of such companies.

Should any such company fail to make the report required by this article on or before the first day of May the Commission shall, at such time as it may elect, upon the best and most reliable information that can be procured, assess the value of the property of the company within this State and shall ascertain the information required herein. In the execution of such duty the Commission shall be authorized and empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§58-550. Copies of assessment for Comptroller and company.—A certified copy of the assessment when made shall be immediately forwarded by the clerk of the Commission to the Comptroller and to the president or other proper officer of each such company. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§ 58-551. Copy of assessment for local authorities.—The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein the property belonging to the company is situated a certified copy of the assessment made by the Commission of such company's property. The assessment shall definitely show the character of the property and its value and the location for the purpose of taxation in each city, town, county and district, so that city, town, county and district levies may be imposed upon the same. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-552. Payment of tax.—Such company shall pay into the State treasury by the first day of October following the assessment the taxes assessed against it. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-553. No other taxes on express companies.—The amount of taxes and licenses imposed by this article and authorized to be imposed shall be in lieu of all other taxes and licenses, State, County and municipal, upon all the property, franchises and privileges of such companies; provided, that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924.)

§ 58-554. Penalty for failure to pay.—Any such company failing to pay such taxes into the State treasury within the time herein prescribed shall incur a penalty thereon of five per centum, which shall be added to the amount of the taxes. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-555. Penalty for failure to report.—Any such com-

pany failing to make the report required by § 58-548 within the time herein prescribed shall be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to any such defaulting company to appear before the Commission and show cause, if any, against the imposition of such fine, subject to appeal to the Supreme Court of Appeals of Virginia. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)